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No. 03-37

Supreme Court, U.S.
FILED
AUG 5 - 2003
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In The
Supreme Court of the United States

INFINEON TECHNOLOGIES AG, INFINEON TECHNOLOGIES NORTH AMERICAN CORP., AND INFINEON TECHNOLOGIES HOLDING NORTH AMERICA INC.,

Petitioners,

v.

RAMBUS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Supreme Court

BRIEF OF *AMICI CURIAE*, CONSUMER ELECTRONICS ASSOCIATION (CEA), ELECTRONIC COMPONENTS, ASSEMBLIES AND MATERIALS ASSOCIATION (ECA), ELECTRONIC INDUSTRIES ALLIANCE (EIA), EMVCO, LLC, GLOBALPLATFORM, INC. (GPI), GOVERNMENT ELECTRONICS AND INFORMATION TECHNOLOGY ASSOCIATION (GEIA), IMS GLOBAL LEARNING CONSORTIUM, INC. (IMS), IPC – ASSOCIATION CONNECTING ELECTRONICS INDUSTRIES (IPC), MASTERCARD INTERNATIONAL INCORPORATED, OPENGIS CONSORTIUM, INC. (OGC), PCI INDUSTRIAL COMPUTER MANUFACTURERS GROUP, INC. (PICMG), THE OPEN GROUP (TOG), VIDEO ELECTRONICS STANDARDS ASSOCIATION (VESA), VISA INTERNATIONAL IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Each *amicus curiae* is a participant in the global process of standard setting, a time-honored process of great benefit to society. There are hundreds of standard setting organizations (SSOs) in the United States alone, creating and maintaining tens of thousands of technical, safety and other standards.

Amici curiae represent a broad range of participants in the standard setting process, and each is greatly concerned by the adverse effects that it anticipates will result from the application of the Federal Circuit Court's decision in *Rambus, Inc. v. Infineon Technologies AG,* 318 F.3d 1081 (Fed. Cir. 2003) in markets that extend far beyond memory chips. Emphasizing the relevance of the *Rambus* case to all areas of standard setting, *amici curiae* include organizations that set standards used in sectors as diverse as defense contracting, consumer electronics, on-line learning, geospatial information, consumer "smart cards" and a broad array of computer system products and services. *Amici curiae* also include important United States companies whose businesses are dependent upon the existence and wide use of standards.

Amici curiae that are SSOs have a combined membership *of more than 8,600* (without adjustment for overlapping memberships), including both Fortune 100 corporations and small privately held companies; Federal

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[1] The following statement is made in accordance with Sup. Ct. R. 37.6: no monetary contributions were made for the preparation or submission of this brief. It has been filed on a pro bono basis by Lucash, Gesmer & Updegrove LLP, which represents many standard setting and promotional consortia, including five of *amici curiae*. No part of this brief was drafted by any parties in this action. Letters of consent from both parties have been filed with the Clerk of this Court.

agencies; universities; and other non-profit entities. These SSOs include both types of organizations which are vital to standard setting in the United States today: those accredited as standards development organizations (SDOs) by the American National Standards Institute (ANSI), and those organizations which also have been formed to create standards in broad or narrow areas, but have not sought ANSI accreditation. These organizations are generally referred to collectively as "consortia." The standards of consortia are also implemented globally. More specifically, *amici curiae* are:

- ***SDOs***: Consumer Electronics Association (CEA); Electronic Components, Assemblies and Materials Association (ECA); Electronic Industries Alliance (EIA); Government Electronics and Information Technology Association (GEIA); and IPC – Association Connecting Electronics Industries. *Collectively, this category of amici curiae represents more than 5,700 members*;
- ***Consortia***: GlobalPlatform, Inc. (GPI); IMS Global Learning Consortium, Inc. (IMS); OpenGIS Consortium, Inc. (OGC); PCI Industrial Computer Manufacturers Group, Inc. (PICMG); The Open Group (TOG); and Video Electronics Standards Association (VESA). *Collectively, this category of amici curiae represents more than 2,900 members*;
- ***Companies***: Visa International and MasterCard International, each of which is a for-profit company that is heavily involved in the process of standard setting, and EMVCo LLC, an entity jointly owned by the foregoing companies for the purpose of maintaining a worldwide payment system specification.

The members of the *amici curiae* organizations, and tens of thousands of others like them, participate in the development of standards voluntarily and at significant cost in terms of dollars and human resources. At the heart of the decision to join a standard setting body is the expectation that the benefits from participation will exceed the risks and costs. Any factors that make participation seem more burdensome tend to discourage participation, with attendant damage to the best interests of consumers and national competitiveness in the global marketplace. *Amici curiae* believe that the impact of the Federal Circuit's decision will, for the reasons described below, have just such a discouraging effect.

It is a fundamental goal of each *amicus curiae* to participate in the development of "open" standards, *i.e.*, standards that are available to all industry participants and that are not subject to unreasonable licensing terms. A cornerstone of any SSO intellectual property rights (IPR) policy is a section that addresses timely disclosure of relevant member-owned IPR. Absent such a policy, a member owner of undisclosed IPR might refuse to grant a license on fair terms to implement an adopted standard to all who would desire one, thus requiring the entire standard setting process to begin anew.

Each *amicus curiae* has a strong interest in the development of sound law supporting enforcement of the intended results of SSO IPR policies. It is of critical importance to *amici curiae* that SSOs be free to adopt the IPR policies that they believe are appropriate to their circumstances, and that those policies are interpreted by the courts as intended by the SSOs that adopted them. *Amici curiae* believe that: (a) the failure of the Federal Circuit to punish Rambus will encourage other standard setting participants to subvert the standards process; (b) the rulings of the Federal Circuit regarding the Joint

Electron Devices Engineering Council (JEDEC) IPR policy have introduced uncertainty for all SSOs that need IPR policies, and impair the freedom of SSOs to adopt intellectual property policies appropriate to their unique circumstances; and (c) current and potential members of all SSOs may decrease their level of participation in the standard setting process if the Federal Circuit's rulings stand.

SUMMARY OF THE ARGUMENT

The *Rambus* case will affect the operations of all SSOs, and not JEDEC alone. In enacting the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. No. 104-113, 110 Stat. 775 (1996), Congress instructed each Federal agency to utilize standards created by SSOs in preference to "government unique" standards to the extent "practicable." Other government actions discussed below recognize, and encourage, industry-wide reliance on SSO developed standards. Allowing a decision to stand that would thwart government efforts to facilitate its standard setting goals would undercut the explicit legislative intent of Congress.

Given the ubiquity of SSO-developed standards in commerce, impairing the standard setting process has the potential to adversely impact facets of modern life as diverse as computer and communications technology, education and national security – all of which are heavily dependent upon the efficient and trusted operation of SSOs and the standards they develop. Absent these standards, such crucial infrastructures as telecommunications and the Internet literally could not exist. *Amici curiae* believe that the rulings of the Federal Circuit will inflict serious damage on the process utilized by SSOs to set such standards.

Specifically, *amici curiae* believe that the Federal Circuit has improperly substituted its own disclosure rules for those voluntarily adopted by JEDEC, and in so doing, excused behavior that threatens the integrity and future of the standard setting process. Participation in SSOs is wholly voluntary. In fact, participants in SSOs pay (often substantially, in the case of upper level memberships in many consortia) for the privilege of creating standards. It is important to note that the *Rambus* case involves not two unrelated parties, one of which is knowingly selling a product that infringes upon the IPR of the other, but two litigants that voluntarily participated in the same standard setting process with the goal of creating specific standards. By doing so, each party anticipated commercial benefit from the adoption and broad implementation of those standards. Each also assumed that a resulting standard might infringe upon its own IPR, and was aware it was subject to rules requiring it to disclose such IPR. One of those parties participated in good faith. The Trial Court concluded that the other party, Rambus, conducted a deliberate program of patent prosecution intended to permit it to later levy an industry-wide tax on the eventually adopted standard.

Such an IPR owner is not in need – or deserving – of the same degree of judicial protection that an innocent IPR owner outside of an SSO deserves with respect to the world at large. Absent a fundamental trust by each standard setting participant that no other participant can manipulate the process to its own advantage, many vendors and others will decide not to participate in standard setting at all. The result would be a world in which only proprietary, so-called "de facto" standards (such as the Microsoft Windows operating system) can emerge,

after much delay, uncertainty and cost, and with attendant limitation on long-term innovation, price competition and business and private consumer choices.

The Federal Circuit's rulings will have additional adverse effects of special concern in patent-rich areas such as computer technology and telecommunications. Hundreds of United States SSOs today maintain thousands of standards relating to diverse technologies. For a partial list, *see* ConsortiumInfo.org, *Consortium and Standards List* (2003) <http://www.consortiuminfo.org/ssl/links.php?cat=1>. At the heart of the processes of these SSOs lie IPR policies. While those policies vary in their terms, each seeks to avoid disputes similar to those that arose in *Rambus*. The Federal Circuit's opinion injects ambiguity into the standard setting process, suggesting – but not settling – questions regarding what IPR rights must be disclosed and when. Without clarification of the practical import of the Federal Circuit's decision, SSOs are faced with the need to reevaluate their policies without knowing specifically what amendments may be necessary to make them enforceable by the courts, and the practical reality that no action may suffice to protect those standards that have already been widely implemented.

Amici curiae also believe that the Federal Circuit's particular application of patent law to the standard setting process is needlessly burdensome on participants, and therefore will discourage the type of broad participation that is essential to the success of standard setting. The current IPR policies maintained by SSOs have evolved to limit the cost of participation: many of them expressly state that members are not required to perform lengthy and expensive patent searches in order to determine whether or not they have IPR which might be infringed by a standard under development. If the cost of participation in standard setting activities becomes too great, current

SSO participants (and particularly the largest United States technology companies, some of which are members of over 150 SSOs, and own the largest patent portfolios) may choose to participate in far fewer SSOs. Updegrove, Andrew, *Survey: Major Standards Players Tell How They Evaluate Standard Setting Organizations,* Consortium Standards Bulletin (June 2003) <http://www.consortium info.org/bulletins/jun03.php#featured>. The result would be standards developed by fewer participants. Historically, such standards have been less likely to be broadly adopted, because they are suspected of being more proprietary and less technically effective. Needless to say, a proposed standard that is not broadly adopted has failed in its essential purpose.

Finally, it is important for this Court to know that SSOs, which receive no governmental support, have meager resources. Spring, Michael B. and Weiss, Martin B., *Financing the Standards Development Process, in* Standards Policy for the Information Infrastructure (B. Kahin and J. Abbate, eds.) 289 (1995). SSOs are not able to perform the type of expensive (but still subjective) patent searches that would be required to lessen (and yet still not eliminate) subsequent contentions by a member that adopted standards infringe upon its IPR. If the courts decline to enforce the integrity of standard setting, then the option of "gaming" the system will become more attractive to SSO members. As a result, additional litigation will reach federal and civil courts, discouraging companies from adopting the standards in question, and over-burdening those courts. Given the rapid pace of innovation in standards-dependent areas such as the technology and telecommunications sectors and the increasing dependence of the world on the products of such innovation, *amici curiae* strongly support the granting of *certiorari* in this case.

ARGUMENT

I. The Efficient Operation of the Standard Setting Process is Vital to the National Interest and is Dependent on the Protection of the Courts

A. Standards are Essential to Almost All Aspects of Modern Life

A standard is required any time two or more people need to agree to do something in the same way – whether it be setting the distance between two railroad rails, the gauge of a pipe fitting, or the technical characteristics of a computer modem. Absent such agreement, one could ride one train only to the end of its owner's tracks before having to switch to the train owned by the next carrier; one could only purchase plumbing products from a single vendor for a given project; and one could exchange electronic data only with a remote source known to have the same modem. Multiply this reality 1,000,000 times, and one begins to form a picture of the vital importance of standards.

Standards underlie almost all aspects of modern life. They are essential to protect security, safety and health. For example, SSOs set standards for building codes, fire safety codes and equipment specifications for diverse types of emergency worker equipment. SSOs swiftly acted to set diverse standards supporting the current Homeland Security Initiative. SSO standards also enable and drive technological advancement and innovation, keeping our domestic infrastructure strong and our economy competitive. Fault intolerant areas such as finance, defense, aerospace and telecommunications depend on rigorous adherence to SSO standards-based specifications, tools, processes and certifications.

Economically, it is well recognized that "standardization has significant consumer benefits in many markets." Lemley, Mark A., *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1896 (2002). Standard setting serves to "increase price competition," "increase compatibility and interoperability, allowing new suppliers to compete," and "increase the use of a particular technology, giving the installed base enhanced economic and functional value." Balto, David A., *Standard Setting in the 21st Century Network Economy*, Computer and Internet Lawyer, Vol. 18, No. 6, 3 (Jun. 2001). Indeed, in the absence of appropriate standards in a patent-rich environment, only a single vendor and such licensees as it chose to favor could offer a new technology, resulting either in the failure of the technology to become widely adopted, or in the development of an inefficient monopoly in the IPR owner for the life of the involved patents.

Out of necessity, the modern world has become increasingly dependent upon the voluntary consensus process that creates standards. The result is a *global standard setting infrastructure* that is as extensive as it is invisible to those not directly involved. This infrastructure includes the official national standard setting organizations of the 146 countries that together comprise the membership of the International Organization for Standardization (ISO). ISO, *ISO In Figures* (Jan. 2003) <http://www.iso.ch/iso/en/aboutiso/isoinfigures/archives/January2003.pdf>. It is estimated that these and other national organizations maintain an incredible 780,000 (or more) official, nationally adopted standards. Toth, Robert B., ed., NIST, *Profiles of National Standards-Related Activities*, Spec. Pub. 912 (Apr. 1997). Consortia create thousands more standards that also achieve national or global adoption, particularly in the areas of information and communications technologies. As a result, standards

represent essential underpinnings to the functioning of the entire modern world. Any action that impedes the process of creating or adopting these standards will also undercut the institutions that rely on them to function. Given our reliance on these institutions, such actions will necessarily and adversely impact a bewildering array of aspects of modern life.

B. Congress has Acted to Facilitate the Creation and Adoption of Standards, and to Make the Federal Agencies Dependent on those Standards

The Federal government has increasingly recognized that standards created through the voluntary consensus process are essential to its efficient and cost-effective functioning. Historically, the government preferentially used "government unique" standards in much of its purchasing, which often served to limit the number of bidding vendors and resulted in higher purchasing costs. As a result, Congress enacted the NTTAA in 1996, which not only requires Federal agencies to use non-government unique standards whenever possible, but to actively participate in the activities of SSOs to facilitate the development of those standards. The most important Federal agencies in the United States use hundreds, and even thousands, of SSO maintained standards, and are completing the task mandated by the NTTAA of substituting SSO and other non-government standards for pre-existing government and agency-specific standards. In 1998, the Office of Management and Budget (OMB) updated Circular A-119 to provide additional guidance to the Federal agencies on implementing such standards. Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity

Assessment Activities, Circular A-119, 63 Fed. Reg. 8545-46, 8554-55 (Feb. 19, 1998).

The National Institute of Science and Technology (NIST) has reported that through 2001 (the latest year for which information is publicly available), the Federal agencies had replaced at least 1,412 government unique standards with non-government standards, and also used thousands of additional non-government standards. NIST also reported that in 2001, the Federal agencies actively participated in at least 847 separate standard setting activities, and collectively were known to still utilize only 54 government unique standards. The five Federal agencies that use the largest numbers of standards (Department of Energy, Health and Human Services, Housing and Urban Development, Department of Transportation and the National Aerospace and Science Administration) collectively utilized over 3,071 voluntary consensus standards, and had directed 1,270 of their employees to participate in the activities of SSOs. McIntyre, Kevin and Moore, Michael B., NIST, *Fifth Annual Report to the Office of Management and Budget on the Implementation of Public Law 104-113 and OMB Circular A-119* (Oct. 2002).

In addition, the Department of Defense has "privatized" thousands of existing government unique standards in areas such as aerospace and electronics by allowing individual SDOs to take over the further maintenance and updating of these standards.

The Federal government has also taken actions to facilitate standard setting by SSOs generally. In 2002, the Federal Trade Commission and the Department of Justice held joint hearings entitled *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy,* which focused in part on IPR policies. *See* FTC, Joint hearings of Federal Trade Commission and Department of

Justice Antitrust Division (2002) <http://www.ftc.gov/opp/intellect/>. In the current session of Congress, the House of Representatives approved the Standards Development Organization Advancement Act of 2003, H.R. 1086, 108th Cong. (2003), a bill that would explicitly extend the coverage of the National Cooperative Research and Production Act of 1993, 15 U.S.C. §§ 4301-05 (1993), which provides a measure of immunity from antitrust sanctions, to the process of voluntary consensus standard setting.

In short, the Federal government has placed vital national interests in all areas of its activities in the hands of the SSO standards development process, and has acted to encourage industry generally to rely on standards developed by the same organizations. It is critical that the courts give force and effect to the rules adopted by SSOs to manage their processes, rather than construe patent and fraud law narrowly to protect individual owners of IPR, especially where a jury has found the hands of such owners to be unclean.

C. Leadership in Standard Setting Provides a Vital National Competitive Advantage

As noted by the American National Standards Institute, the internationally acknowledged accrediting organization for SSOs in the United States, leadership in standard setting is an important factor in maintaining national competitiveness. NIST has reported that in 1997, the United States maintained over 93,000 national standards (excluding Consortium maintained standards), two and a half times the closest contender (Germany, with approximately 37,000). Japan, the world's second largest economy, maintained only 18,000 standards, Toth, *supra*, a fact that reflects in part its role as a technology adopter that competes on price – an area where the United States

is at a disadvantage – rather than a technology creator that can compete with the United States on innovation.

Excelling through innovation will not lend an important advantage to the United States over competitors such as Japan, however, if the resulting products are based upon standards that do not become internationally adopted. When a country is successful in gaining global acceptance of an important standard that originates from technology that its domestic companies have created, it gains an important lead in research, production and sales for the same companies. While the United States currently leads the world in many standard setting areas due in significant part to the vigor of its SSOs, other countries and regions (in particular, Europe) increasingly are utilizing standards as competitive weapons to the advantage of their local industries. ANSI, *National Standards Strategy for the United States* (Aug. 31, 2000) <http://public.ansi.org/ansionline/Documents/News%20and%20Publications/Brochures/national_strategy.pdf>. If the United States' standard setting process falters, American innovation will fail to capture markets that it would otherwise command.

II. The Integrity of the Voluntary Standard Setting Process is Jeopardized by the Failure of the Federal Circuit to Punish the Conduct of Rambus

While the *Rambus* case factually presents a dispute involving patent rights, the more fundamental question presented is whether the conduct engaged in by Rambus was fraudulent. The holding of the Federal Circuit therefore applies broadly to all standards and processes by which they are created. This conclusion necessarily arises from the fact that there are ways in which SSO members,

acting alone or in concert with other members, can manipulate the setting of non-IPR relevant standards to their advantage. *See, e.g., Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed.2d 497 (1988) (steel industry members of the National Fire Protection Industry "packed" an Association meeting with steel industry sympathizers to prevent adoption of plaintiff's proposal to include plastic as an approved material for making electrical conduit subject to the National Electric Code).

Particularly in the area of technology, where standards are essential to allow systems to be assembled out of the products of multiple vendors and to communicate via the Internet, SSOs provide their members with the potential for the rapid development and commercial launch of new products and services. Yet these groups are voluntary, consensus-based organizations. They function by a complex, fragile "honor" system, guided by common principles of collaboration and collective benefit.

Allowing an SSO member to violate this system with impunity, as the jury concluded that Rambus had set out to do and as the Federal Circuit refused to punish, presents a threat to the very concept of voluntary participation. Defendants in *Rambus* and other members of JEDEC unknowingly helped create (and then walked into) an extremely expensive trap laid by Rambus. If this wrong goes unredressed by the courts, similarly situated technology companies are likely to conclude that it is ultimately safer to revert to the vastly less preferable (and recent)

practice of developing completely proprietary products and services whenever possible.[2]

III. Intellectual Property Policies are Necessary for the Success of Voluntary Standard Setting

For standard setting to be successful, SSOs need to employ development and adoption policies that will minimize the probability of inadvertently releasing a standard subject to the IPR claims of others. *Amici curiae* and other SSOs have adopted IPR policies that vary greatly in their specifics. *See* Lemley, *supra,* at 1904-06, 1973-75 (summarizing the results of a survey of the intellectual property policies of 43 standard-setting organizations), and ConsortiumInfo.org, *Consortium and Standards List*, *supra* (providing links to the IPR policies of scores of SSOs). This variation reflects the diverse needs and circumstances of different industries, distinct policy judgments about the appropriate role of intellectual property in standardized technologies, and the evolutionary path of individual SSOs. But most such IPR policies either (i) require disclosure of IPR during the standardization process, or (ii) impose other requirements that make disclosure unnecessary (such as requiring all members to pre-commit to granting a royalty-free license to any necessary IPR owned by them). See, for example, the IPR policy of the World Wide Web Consortium. W3C, *W3C*

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[2] The classic example is the commercial war which raged between two competing, patented, video designs: JVC's VHS format and Sony's Betamax format. This failure by industry to agree on a common standard ultimately left millions of consumers with Betamax video players for which new videotapes could not be rented after the VHS format achieved supremacy. *See* ConsortiumInfo.org, *What (and Why) is a Consortium?* (2003) <http://www.consortiuminfo.org/what/>.

Patent Policy (May 20, 2003) <http://www.w3.org/Consortium/Patent-Policy-20030520.html>.

Despite the best efforts of SSOs to deal with IPR issues, there have been many disputes with members involving IPR rights, some of which have reached the courts or been the subject of administrative actions brought by the Federal Trade Commission. *See, e.g., In the Matter of Dell Computer Corp.*, 121 F.T.C. 616, 1996 FTC LEXIS 291, Docket No. C-3658 (May 20, 1996) (Consent Order) and *Stambler v. Diebold, Inc.*, 11 U.S.P.Q.2d 1709 (E.D.N.Y. 1988), each of which involved behavior similar to *Rambus*. In the former, Dell entered into a consent decree obligating it to provide royalty free licenses to all; in the latter, where the IPR owner waited ten years before asserting its patent claims, the Court applied the doctrine of laches to bar enforcement of those claims. Such disputes will certainly become more frequent as the complexity of technology increases, and will particularly act to the detriment of companies with few patents that cannot resolve disputes outside of the courts by bartering patent licenses back and forth. As noted by Carl Cargill, the Director of Standards for Sun Microsystems (itself a member of over 150 SSOs):

> In [building a mobile] telephone, there are 137 essential patents. The ability of a small company to enter this market is limited if they have no large patent portfolio from which to deal. At the same time, Tim Berners-Lee of the W3C [World Wide Web Consortium] has estimated that every time someone clicks a mouse in a web application, thirty patents are invoked. Again, if a small company does not have a significant patent portfolio with which to deal, they are at the mercy of the patent holders who own essential patents in the standards. Cargill, Carl F., *The Sisyphus*

Agenda: Standardization as a Guardian of Innovation, 14-15 (Jan. 27, 2003) <http://cip.umd.edu/cargillpaper.doc>.

Even among large companies, all may not be well. As noted by The Economist, predicting the *Rambus* tempest with uncanny accuracy at the very time that the conduct at issue was occurring, "[T]he noisiest of . . . competitive battles (between suppliers) will be about standards. . . . [I]n the computer industry, new standards can be the source of enormous wealth, or the death of corporate empires. With so much at stake, standards arouse violent passions." The Economist, *Do It My Way*, Vol. 326, Issue 7800, 11 (Feb. 27, 1993). The technology world has made huge strides since this article was written – today, truly open standards pervade the technology marketplace. But if the integrity of the standard setting process is not upheld, then there is great danger that technology companies will revert to the types of battles to impose proprietary standards described in this article.

In weighing the equities, the answer should be clear: disclosing patents in the manner now required by SSO IPR policies represents a small burden. In contrast, plotting to economically hijack a standard under development can have a very high commercial and societal cost indeed. Without the assistance of the courts to punish such past abuses, future abuses can be expected.

IV. The *Rambus* Decision Casts Unnecessary Doubt on IPR Policies Already Adopted, and will Impede the Future Development of Standards

The Court's imposing its own disclosure rules on the JEDEC standard setting process will place great stress on existing SSO IPR policies and the past and future

standards created under them. Members of SSOs will be in doubt as to whether standards already adopted may be undermined by new assertions of infringement, and whether a *Rambus*-compliant IPR policy will make their standard setting activities more laborious, less effective and less acceptable to their members. Since single companies often own large patent portfolios which pervasively cover a given technology niche, the withdrawal from a given SSO of even one company due to new, more burdensome rules may have severe adverse consequences.

The integrity and success of voluntary SSOs require that their IPR policies be interpreted consistently with the policies' goals and the reasonable expectations of the organizations' members. If SSOs must fear that courts will impose their own interpretations of these policies after the fact, needless uncertainty is created over members' disclosure obligations in practice. At worst, such uncertainty may make members question whether SSO participation is worthwhile at all.

The Court's narrow, claim-specific and standard-specific interpretation of patent disclosure obligations would also adversely and unnecessarily restrict the processes of SSOs. SSOs constantly struggle to balance the need for timely disclosure with the need of patent owners to know what they may be committing to license. Early disclosure allows an SSO technical committee to "design around" the patent rights of others, allowing the process to proceed more smoothly and quickly. Yet until a specification is in final form, a conclusive claim-by-claim analysis would be impossible. If disclosure is only compelled (or even possible) at the end of the process, then constant restarts will become the norm even when all participants are acting in good faith. With "time to market" of critical concern to technology companies, slowing the process could once again dramatically alter the calculus of many

companies deciding whether to participate in a given standards activity at all.

The broad JEDEC patent disclosure policy was an effective tool for avoiding this result. While, indeed, there are SSOs that deliberately adopt a narrower policy which only requires disclosure of patent claims that would "necessarily be infringed" by any implementation of an adopted standard, there are others which, for reasons relating to such factors as a small membership or a narrow technical focus, find a broader approach acceptable and preferable. Hence, the path taken by JEDEC in crafting its policy is not an example of imprecision, but of a conscious choice between two established alternatives. SSOs need latitude to continue to develop, implement and enforce intellectual property policies of their own design, suited to particular circumstances.

The claim-specific and standard-specific approach adopted by the Federal Circuit would also require expensive restaffing by SSO members. For sound reasons, the participants in standards development typically are engineers and other technical personnel, not patent attorneys. To require these participants to conduct a claim-by-claim comparison of patent claims in every standards process would make it far more difficult for them to understand and comply with disclosure obligations, increasing the likelihood of innocent errors. In actual practice, any IPR policy rule which would arguably require a member to perform a formal patent search has consistently and flatly been rejected as unacceptable by companies with large patent portfolios. Given that the largest technology companies belong to hundreds of different SSOs, and even much smaller companies often belong to multiple SSOs, it would in any event be economically unfeasible for companies of any size to meet the requirements of such a policy.

Amici curiae also fear that the Federal Circuit's claim-specific and standard-specific approach leaves SSOs and their members uncertain as to what would constitute an appropriate trigger for disclosure obligations. While the decision states that a full infringement analysis is not necessarily required, Judge Prost's dissent points out that the panel majority's opinion "arguably requires a *Markman* claim construction, application of the doctrine of equivalents, a *Festo* analysis, and perhaps even a *Johnson & Johnston* analysis." The Federal Circuit's decision offers no guidance on how an SSO could develop an IPR policy that would be less burdensome in its application. This lack of guidance necessarily imposes a burden of uncertainty on this central point that will prevail until another dispute reaches this level of judicial review.

CONCLUSION

Due to the profound and pervasive adverse effects anticipated from the Federal Circuit's holdings in *Rambus*, *amici curiae* respectfully request that this Court grant *certiorari*.

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